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SERVICE DATE - JULY 6, 1998

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33424

PORTLAND & WESTERN RAILROAD, INC.--ACQUISITION
AND OPERATION EXEMPTION--THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY

Decided: June 26, 1998

On July 3, 1997, Portland & Western Railroad, Inc. (PWR), filed a verified notice of exemption under 49 CFR 1150.41 from the provisions of 49 U.S.C. 10902 to acquire and operate approximately 91.66 miles of line owned by The Burlington Northern and Santa Fe Railway Company (BNSF), known as the Astoria Branch, between milepost 5.22 near Willbridge, OR, and milepost 96.88 near Tongue Point, OR.¹ The exemption became effective on July 10, 1997.² Also on July 10, 1997, John D. Fitzgerald, on behalf of the United Transportation Union--General Committee of Adjustment (UTU-GCA), filed a petition to reject, to revoke, and to stay the exemption, to which PWR replied. Notice of the exemption was served and published in the Federal Register on July 22, 1997 (62 FR 39301).³ On August 1, 1997, UTU-GCA filed an appeal to the publication of the notice of exemption, arguing that the notice should have been rejected or stayed. PWR replied to the appeal. We will deny UTU-GCA's petition and appeal.

DISCUSSION AND CONCLUSIONS

The petition to revoke.

Under 49 U.S.C. 10502(d), we may revoke an exemption if we find that regulation of the transaction at issue is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. Labor interests may raise issues concerning the appropriate level of labor protection in a petition for revocation. See 49 U.S.C. 10502(g) and Simmons v. I.C.C., 900 F.2d 1023 (7th Cir. 1990). To the extent that a party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. Minnesota Comm. Ry. Inc.--Trackage Exempt.--BN R.R. Co., 8 I.C.C.2d 31, 37 (1991). The party seeking revocation has the burden of proof and petitions to revoke must be based on reasonable, specific concerns

¹ As part of the same transaction, BNSF granted incidental trackage rights to PWR over a 1.92-mile line between milepost 5.22 and milepost 3.30 near Willbridge Yard.

² The transaction was consummated on July 11, 1997.

³ Because the notice of exemption became effective on July 10, 1997, the same day UTU-GCA's petition to stay was filed, the stay request was not considered.

demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary. See CSX Transp., Inc.--Aban.--In Randolph County, WV, 9 I.C.C.2d 447, 449 (1992); and I&M Rail Link, LLC--Acquisition and Operation Exemption--Certain Lines of Soo Line Railroad Company D/B/A/ Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), slip op. at 6. UTU-GCA has failed to demonstrate that regulation of this transaction is necessary or that any substantive basis exists for revocation of the exemption. Accordingly, we will deny its petition to revoke.

UTU-GCA argues that PWR's acquisition of an exclusive rail easement over the right-of-way is in reality a lease of the line. According to UTU-GCA, a lease is not a transaction under 49 U.S.C. 10902 and is not embraced within the class exemption at 49 CFR 1150.41. UTU-GCA submits that the decision which created the class exemption for 49 U.S.C. 10902 did not mention leases in the list of transactions, whereas the decision which created the class exemption for 49 U.S.C. 10901 specifically pointed out that leases are included.⁴

PWR denies that the transaction is a lease because it is purchasing all of the assets of the rail line, including sufficient title to operate the line. Even if the transaction could be construed as a lease, PWR contends that there is no substantive difference between 49 U.S.C. 10902 and 10901, or their respective class exemptions. In addition, PWR submits that we have granted exemptions involving leases under 49 U.S.C. 10902.

UTU-GCA offers no evidence or argument in support of its allegation that this transaction involves something less than a bona fide easement for PWR to conduct railroad operations over this right-of-way.⁵ We have reviewed both the easement, which gives PWR permanent and exclusive rights to conduct rail operations over the right-of-way, and the bill of sale, which transfers title to all rail service related property to PWR and conclude that these instruments cannot be interpreted as creating a landlord-tenant relationship, as UTU-GCA contends.

Moreover, we agree with PWR that, even if this were a lease, it would still qualify as a 49 U.S.C. 10902 transaction and fall within the class exemption at 49 CFR 1150.41. In patterning the class exemption for 10902 transactions after the class exemption for 10901 transactions, we noted

⁴ In Class Exemption--Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 n.1 (1985), the terms "acquire" and "operate," appearing in section 10901, were found to include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate. Compare Class Exemp For Acq. or Oper. - Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996) (Class Exemp-10902).

⁵ While UTU-GCA states that, as of the date it filed its petition (July 10, 1997), PWR had not provided it with a copy of the agreement governing the transaction at issue, PWR states, in its reply, that copies of the bill of sale and of the easement were provided to UTU-GCA's counsel on July 8, 1997.

the similarity between the two statutory provisions. See Class Exemp-10902, 1 S.T.B. at 101. Because the language of the approval criteria is identical in both statutes, it created an obvious relationship between the two provisions and was the reason that we modeled the new 10902 class exemption after the existing 10901 class exemption.⁶ The fact that the new regulations do not specifically mention leases is of no consequence. Chicago Rail Link, L.L.C.--Lease and Operation Exemption--Union Pacific Railroad Company, STB Finance Docket No. 33323 (STB served Sept. 2, 1997), slip op. at 6 (Chicago Rail Link). The identical arguments advanced by UTU-GCA in this case were found to have no merit in Chicago Rail Link. In that case we determined that the new class exemption applies to acquisitions or operations by Class III rail carriers under 49 U.S.C. 10902 and no section 10902 transactions are excluded. We saw no need to discuss the longstanding interpretation that a lease or a right to operate is included in the terms “acquire” and “operate,” and there is no need to discuss it here either, because the matter is well settled.

In addition to its argument about leases, UTU-GCA contends, without providing any support, that regulation of this transaction is necessary to carry out the RTP goals of 10101(4), (5), and (12), which are aimed at promoting an economically sound, competitive transportation system. UTU-GCA suggests that PWR will have a “virtual monopoly” in northwest Oregon, and that there are anticompetitive consequences to the transaction. PWR responds that it has significantly less ability to dominate or control the market than BNSF had. We agree with PWR and cannot find, as a general rule, that the transfer of existing rail lines and operations from a major Class I carrier to a short line carrier diminishes the pre-existing competitive situation for shippers or the public. Accordingly, we attach no weight to UTU-GCA’s unsupported contention.

Finally, UTU-GCA alleges that PWR is not financially independent of BNSF, referring to our inquiry into their relationship based on UTU-GCA’s allegations in another exemption revocation proceeding involving PWR. UTU-GCA provides no additional support for its allegation, which, after an investigation, we found unwarranted in Portland & Western Railroad, Inc.--Lease and Operation Exemption--Lines of Burlington Northern Railroad Company, STB Finance Docket No. 32766 (STB served Oct. 15, 1997). Accordingly, we find this unsupported allegation unpersuasive as well.

The appeal.

We will also deny UTU-GCA’s appeal of the July 22, 1997 decision publishing the notice of exemption. In declining to reject the notice of exemption, the Director of the Office of Proceedings (Director) stated that the notice complied with the regulations at 49 CFR 1150.41 et seq. UTU-GCA does not take issue with this statement, but instead advances the same argument made in connection with its petition to revoke--that the class exemption for 10902 transactions does not

⁶ Joseph C. Szabo, the Illinois legislative director for the United Transportation Union, had argued that the new class exemption for 10902 transactions should be patterned after the class exemption for 49 U.S.C. 11323 transactions, but he failed to justify his position. Id.

embrace leases. Accordingly, we will deny UTU-GCA's appeal of the Director's denial of the petition to reject, for the same reasons that we are denying the petition to revoke.⁷

As part of the appeal, UTU-GCA requests that we "reverse the non-action of the Director, and rule that [we have] authority to entertain stay requests between the time the notice becomes effective and the consummation date given in the notice." It is neither appropriate nor necessary to grant this request. We note that the stay request was filed after the exemption had taken effect, as the Director observed. While it might have been theoretically possible for the Board to issue a decision addressing the stay request before the consummation of the transaction (which evidently took place the following day on July 11, 1997), there was no error in the failure to do so. In any event, we note that, in stating that the stay request would not be considered, the Director was not making a jurisdictional finding that the agency could not address a stay request after effectiveness of an exemption and before consummation of the exempted transaction.

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU-GCA's petition to revoke is denied.
2. UTU-GCA's appeal is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁷ UTU-GCA also argues that the Director's authority is limited to issuing notices of exemption and rejecting notices on environmental grounds only, because these items are specifically mentioned in the delegation of authority by the Board to the Director at 49 CFR 1011.8(c). We note that, even though there is no specific delegation to the Director to issue notices of exemption for 10902 transactions in 49 CFR 1011.8(c), UTU-GCA does not challenge the Director's authority to do so, which is specifically provided for at 49 CFR 1150.42(b). The authority to publish implies the authority to reject in lieu of publication for defects in the filed notice. For that reason, there is no specific mention in 49 CFR 1011.8(c) of the Director's authority to reject notices in any of the class exemptions, yet this has been the practice since the class exemption procedures were first instituted.